
STATE OF MINNESOTA

DEPARTMENT OF TRANSPORTATION

**Administrative Reconsideration Hearing Request by
Veit & Company, Inc.
State Project Number 8826-143**

MnDOT # TRP/292/TGB/2014

ADMINISTRATIVE RECONSIDERATION PANEL DECISION

Minnesota Department of Transportation Office of Civil Rights ("OCR") set a Targeted Group Business ("TGB") goal of 2.8% for a Culvert Lining Project on TH 61 in MnDOT District 6 – State Project Number 8826-143 ("Project"). Veit was the apparent low bidder ("ALB") on the Project. Veit requested a waiver from the TGB subcontract goal on the grounds that qualified TGBs are not reasonably available to perform on this project ("Waiver Request"). By letter dated June 2, 2014, ("OCR's decision") the OCR informed Veit that it failed to identify its actions to obtain the participation of a single TGB firm on the Project, or provide sufficient documentation to support the request for a waiver. The OCR denied Veit's Waiver Request and Veit requested a reconsideration of the OCR's decision.¹

A panel of three ("Panel") conducted a reconsideration hearing on July 15, 2014. Nancy Daubenberger (State Bridge Engineer), James Cownie, (Assistant Chief Counsel and Director, Contract Management), Nandana Perera, (Associate Legal Counsel) served as the three panel members. The Panel did not take part in the OCR's original determination. The Panel informed the parties in writing of the location, time duration, and their rights at the hearing.² Jeff Thompson and Steven Melchoinne, Assistant Attorneys General represented the OCR. Brent Johnson and Mark Sonaglia appeared at the hearing on behalf of Veit. Richard Varco, Assistant Attorney General, advised the Panel. Both Veit and OCR had equal opportunities to present their respective positions at the hearing on July 15, 2014. A transcript was prepared by a court reporter.

PANEL'S FINDINGS, CONCLUSIONS, AND REASONS

1. **The Law** - Minnesota Statutes § 161.321, Subd. 2a (a) authorizes the Commissioner of Transportation ("Commissioner") to set goals that require the prime contractor to subcontract portions of the contract to TGBs. This section also authorizes the Commissioner to establish a procedure for granting waivers from the subcontracting requirement upon a showing that qualified TGBs are not reasonably available.
2. Minnesota Department of Transportation (MnDOT) has issued Targeted Group Business and Veteran-Owned Small Business Special Provisions ("TGB Special Provisions") to establish the Targeted Group Business and Veteran-owned Small Business program pursuant to Minn. Stat. §161.321. The TGB

¹ Letter dated June 6, 2014 from Brent Johnson addressed to deputy Commissioner Susan Mulvihill.

² Notices of Hearing dated July 8, 2014.

Special Provisions provide that if the apparent low bidder (ALB) fails to meet the TGB goal, it must apply for a waiver. If the OCR does not grant the waiver, the ALB may request administrative reconsideration.³ Although Veit asked for a waiver from the obligation to meet the 2.8% goal, the OCR treated this request and its supporting evidence as if Veit had indicated that it made reasonable good faith efforts to meet that goal. The OCR concluded that Veit had not made such efforts and denied the Waiver Request. Veit then asked for reconsideration. In this case, the Panel considered whether Veit provided information showing that eligible TGBs are not reasonably available. For the reasons that follow, the Panel concludes that Veit did not make that showing either to the OCR or to the Panel.

3. **The Case** - The bid letting date was April 25, 2014.⁴ The TGB project goal was 2.8%. The Project's bid package included the TGB Special Provisions. Veit obtained 0% TGB participation and submitted the Waiver Request on May 5, 2014.⁵ The OCR does not dispute the timeliness of Veit's submission of the Waiver Request.⁶

4. The Project is a culvert lining project. The work on the project consists of the repair of culverts by the installation of a resin-impregnated flexible tube, which is formed to the original culvert by use of a hydrostatic head. The resin is cured using either hot water under hydrostatic pressure or steam pressure within the tube. When cured, the cured-in-place pipe (CIPP) will be continuous and tight fitting.⁷

5. Veit stated two reasons to support the Waiver Request: Veit will 100% self-perform the work on this project, and there is no opportunity to subcontract any of the work to an outside subcontractor or vendor. Both the Bidder's List and Certificate of Good Faith Efforts that Veit submitted along with the Waiver Request stated "Veit is self-performing this project." Greg Boelke, President of Veit signed the Waiver Request stating, among other things, "I have provided a detailed explanation of the efforts I made to obtain TGB participation and the *determination that TGBs are not reasonably available to perform on this project.* (Emphasis added.) Request for Waiver Form required the bidders requesting a waiver to complete and submit a "summary explaining the bidder's determination that businesses are not reasonably available." Greg Boelke also signed and submitted Good Faith Efforts Affidavit that affirmed the accuracy of Veit's submission.⁸ Veit did not submit any other documents or explanation to the OCR to support its Waiver Request.

6. Veit's Waiver Request did not contain any information whatsoever to support its determination that TGBs are not reasonably available to perform on the Project. Instead, it contained a conclusive statement to that effect.⁹ But in its June 6, 2014 request for reconsideration, Veit states that CIPP lining

³ TGB Special Provisions, section 12.1.

⁴ Certificate of Good Faith Efforts.

⁵ OCR's decision, p 1.

⁶ Tr. 26.

⁷ S.P. 8826-143 Contract proposal dated March 27, 2014.

⁸ Veit's cover letter dated May 1, 2014; Veit's good faith efforts documentation submitted to OCR on May 5, 2014 including Waiver Request signed by Greg Boelke; and Veit's request for a meeting dated June 6, 2014.

⁹ Veit's cover letter dated May 1, 2014 and Waiver Request.

projects require “a small 5 person specially trained crew which leaves little or no opportunity to meet TGB goals.” The same letter states that CIPP lining work is performed by “only a handful of contractors in the area.”¹⁰

7. **CIPP Work** – In support of the Waiver Request, Veit was obligated to explain its determination, at least in summary form, that TGBs were not reasonably available to perform on the Project.¹¹ Veit did not do this. Instead it asserted only that it would be “self-performing this project.”¹² This failure to comply with the requirements of the TGB Special Provisions provides sufficient grounds for the Panel to conclude that Veit was not entitled to a waiver from the Project’s goal. Even assuming that “self-performing” is shorthand for “There are no TGBs reasonably available,” Veit offered no evidence to support that proposition. The Panel is unable to give much weight to Veit’s assertion in the absence of any documentation to substantiate it. This is especially so because Veit failed to provide any explanation whatsoever to the OCR. Veit did not support its determination by any evidence other than saying it knows that this is so.¹³ Even assuming Veit demonstrated that no TGBs were reasonably available to perform CIPP work in a previous MnDOT project, (S.P. No. 8822-157), that was evidence only as of May 2013.¹⁴ Veit has not shown why, in a progressive industry, it could rely on the knowledge that it had one year ago. As an example of why this is true, the Panel pointed out that a simple search with the key word “pipe” brought up at least one TGB, Innovative Trenchless Solutions, Inc. describing its services, among others, as “CIPP liners.” When asked whether Veit contacted this firm to find out if it can do this work or supply the CIPP liners, Veit said no.¹⁵ Whether Innovative Trenchless Solutions, Inc. in fact performs the CIPP work or supplies the CIPP materials does not affect the Panel’s analysis. The Panel’s inquiry is what effort Veit made to determine if any TGB either performs CIPP work or, at least supplies the CIPP materials. Veit did not make any effort to do so. Veit justified its failure to contact any TGB by saying that Veit has an agreement with a consortium and they wanted to buy the CIPP products as cheap as they could.¹⁶ The Panel cannot determine if this is a legitimate justification for seeking a waiver from a program that the state law has established. Quite simply, Veit has not provided sufficient documentary evidence of this to either the OCR or to the Panel. In addition, the Panel is not required to decide whether this is a legitimate justification; Veit offered this only as an explanation of why it undertook *no efforts* to determine if TGBs were reasonably available.

8. **Traffic Control Work and Previous Project (S.P. 8822-157)** - Veit submitted to the Panel, (but not to the OCR) documentation from a previous project (S.P. No. 8822-157) for similar work using CIPP. Veit argues that it received a waiver for that project on the grounds that qualified TGBs were not reasonably available. In S.P. No. 8822-157, with a total bid price of \$3,031,470, Veit obtained a TGB commitment of \$21,418 for traffic control work and also received two quotes from veteran-owned businesses through its solicitation efforts. Veit makes a distinction between S.P. No. 8822-157 and this

¹⁰ Letter dated June 6, 2014, from Brent Johnson to Deputy Commissioner Susan Mulvihill.

¹¹ TGB Special Provisions, section 8.5.

¹² Veit’s May 1, 2014 letter, Bidders’ List, and Certificate of Good Faith Efforts,

¹³ Tr. 11-14.

¹⁴ Veit’s submission to the Panel – documentation from S.P. No. 8822-157.

¹⁵ Tr. 31-32.

¹⁶ *Eg.*, Tr. 32-33.

Project.¹⁷ Explaining the reason for not having any TGB participation for traffic control on the Project, Veit states that unlike in S.P. No. 8822-157, the work on the Project will not progress sequentially as the locations where traffic control will be needed cannot be pre-determined. Veit submits that in this project, Veit may be "jumping from A to Q back to D instead of A,B,C."¹⁸ Assuming without concluding, this is so, if Veit hires another subcontractor to perform traffic control, Veit will be calling them and asking them to transport its equipment and signs to different locations at different times. Veit has all or most of the equipment and signs that are needed.¹⁹ The Panel can reasonably conclude that having to coordinate with another contractor to do the traffic control would be more inconvenient and more costly. But unlike in S.P. 8822-157, the Panel does not have any evidence of efforts that Veit made either to solicit or determine this objectively. The Panel has nothing but Veit's belated explanation for not soliciting traffic control work.

The Panel also asked if Veit examined the estimated cost of having a subcontractor do the traffic control work. Again, the answer was no.²⁰ Even if Veit was entitled to assume no TGBs were reasonably available to perform CIPP work, Veit failed to make good faith efforts to determine that there were no TGBs to perform traffic control work. In short, Veit made determinations to suit its needs – self-perform instead of making efforts to solicit the only other scope that was open for TGB participation. Veit did not have to *use* a TGB to do the traffic control work. But Veit should have explained to OCR why no TGB was reasonably available for such work. And Veit did not.

9. **Safety Signs Quote and the OCR Communications** – At the hearing, the OCR presented evidence that was not used for its June 2, 2014 determination. This evidence consisted of e-mail communications between the OCR and Safety Signs.²¹ On June 10, 2014, Joyce Brown-Griffin from the OCR and Mark Hayes at Safety Signs communicated with each other about the Project. It is not entirely clear what Brown-Griffin and Hayes discussed. An e-mail from Hayes at 11.33 a.m. on June 10, 2014 addressed to Brown-Griffin states, "I found IT." It appears there is an attachment to that e-mail because a scan date and time appears at the bottom of that e-mail. There is a quote from Safety Signs for traffic control work and the project number on the quote is SP 8826-143.²² So it is clear that Safety Signs quoted on the Project. The quote was undated, and not addressed to any person or entity. Panel can only conclude that Safety Signs submitted a quote but an e-mail from Hayes suggest that it was not submitted to Veit.²³ The e-mail reply from Hayes to Brown-Griffin at 11.44 a.m. on June 10, 2014 suggests that Safety Signs sent the quote to Lametti and Subsurface. The same e-mail also states, "Did not know Veit was bidding it." Because it is undisputed that Veit did not solicit any work on this project, the Panel excludes this subsequent evidence as irrelevant or insignificant.

Veit commented that they included some money in their bid to rent some signs from Safety Signs.²⁴ This was not a result of any solicitation of, or negotiation with, Safety Signs. The Panel is unable

¹⁷ Veit's submission to the Panel – documentation from S.P. No. 8822-157.

¹⁸ Tr. 9.

¹⁹ Tr. 7.

²⁰ Tr. 37.

²¹ OCR submission to the Panel – three e-mails dated June 10 exchanged between Mark Hayes (Safety Signs) and Joyce Brown-Griffin.

²² OCR submission to the Panel – Safety Signs Quotation (undated and not addressed to any entity or person)

²³ OCR submission to the Panel – e-mail from Mark Hayes sent to Joyce Brown-Griffin at MnDOT OCR at 11.44 a.m. on June 10, 2014.

²⁴ Tr. 54.

to evaluate whether the cost of doing so would have been unreasonably excessive as, again, there is a complete lack of any evidence from Veit.

10. **Performance of Other Bidders** - The OCR did not consider the performance of other bidders on the Project to deny the Waiver Request. But at the hearing, the OCR submitted that the other bidders on the Project solicited and received quotes from Safety Signs to meet the 2.8% TGB goal.²⁵ The TGB Special Provisions section 11.2.10 b. states, "when the apparent successful bidder fails to meet the goals, but others meet it, you may reasonably raise the question of whether, with additional reasonable efforts the apparent successful bidder could have met the goals." Accordingly, the Panel admits this evidence as relevant to the final determination in this case. This evidence supports a finding that other bidders found TGBs who were reasonably available. Veit fails not because it did not obtain the 2.8% TGB goal like the other bidders. Veit fails because it did not demonstrate its efforts to determine that there are no TGBs reasonably available when the other bidders found TGBs to work on the Project.

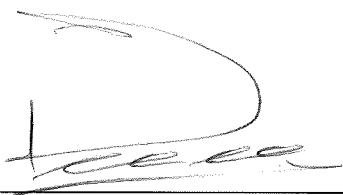
11. In meeting the TGB goal or determining that qualified small TGBs are not reasonably available, an ALB must make some solicitation efforts. Moreover, an ALB cannot arrive at unsupported, unsubstantiated conclusions as to availability of the TGBs. The ALB must document all attempts or research it did to arrive at its conclusions and demonstrate those efforts to the OCR. Veit failed to make any attempts. As a result, Veit had no evidence to demonstrate its efforts to determine that qualified TGBs are not reasonably available.

Decision

Based on the entire record before the Panel, and presentations of the parties, the Panel concludes that Veit failed to provide evidence to support its Waiver Request. The Panel concludes that the OCR's review of the Waiver Request and Veit's good faith efforts was fair and reasonable. Accordingly, MnDOT must deny Veit's Waiver request.

July 22, 2014

Date



A. Nandana Perera
Associate Legal Counsel

For the MnDOT Administrative Reconsideration Panel of
July 15, 2014.

²⁵ OCR Outline dated July 15, 2014, p 3.